

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD<sup>1</sup>  
REGION 32

DIAMOND WALNUT GROWERS, INC.

Employer

and

Case 32-RC-3553

CANNERY WORKERS, PROCESSORS,  
WAREHOUSEMEN AND HELPERS, LOCAL 601,  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, AFL-CIO

Petitioner

**EIGHTH SUPPLEMENTAL DECISION AND NOTICE OF HEARING**

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the Employer's objections in the second rerun election to be conducted and hereby overrules Objections Nos. 1, 2, 3, 6, 7, 9, 11, 12, 15 and 16 and orders a hearing be held on Objections Nos. 4, 5, 8, 10, 13, 14, 17, 18, and 19.

**The Election**

Pursuant to a Decision and Direction of Election that issued on July 10, 1992, the initial representation election in this case was conducted on October 14, 1992. After failing to receive a majority of votes in that election, the Petitioner filed objections, resulting in the direction of a second election that was conducted during the following season on October 8, 1993.<sup>2</sup> Thereafter,

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<sup>1</sup> Hereinafter the Board.

<sup>2</sup> The peak of the season is normally in the fall of each year.

again failing to obtain a majority of votes in the rerun election, the Petitioner filed election objections and an unfair labor practice charge, which ultimately resulted in the Board issuing a Decision, Order and Direction of Third Election on January 20, 1995. Upon a petition for review, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's Order in part and denied enforcement in part, and remanded the case to the Board for further processing. On August 7, 1998, the Board issued a Supplemental Decision and Direction of Third Election. The Petitioner subsequently filed additional unfair labor practice charges that blocked further processing of the Petition. The Board, following a hearing before an administrative law judge that closed on March 21, 2001, on November 28, 2003, issued a decision that required that the Employer remedy certain unfair labor practices. Upon completion of the compliance period, those cases closed on March 17, 2004. Because, as noted above, of the seasonal nature of the Employer's operations, the second rerun election was conducted on October 14 and 15, 2004,<sup>3</sup> in the following appropriate bargaining unit:

All full-time and regular part-time, and seasonal maintenance, production and warehouse employees employed by the Employer at its facility located at 1050 South Diamond Street, Stockton, California; **excluding** executive employees, administrative employees, professional employees, office and clerical employees, company inspectors, landscaping other than routine gardening to be performed by the bargaining unit gardener employee, guards and supervisors as defined in the Act.

The Tally of Ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters.....	1064
Number of void ballots .....	9
Number of votes cast for Petitioner.....	311
Number of votes against participating labor organizations...	262
Number of valid votes counted.....	573

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<sup>3</sup> All dates hereinafter are 2004 unless indicated otherwise.

Number of challenged ballots.....	76
Valid votes counted plus challenged ballots.....	649

Challenges were determinative of the results of the election.

Subsequent to the election, on November 2, the undersigned approved a Stipulation on Challenged Ballots concerning the challenges made by the Petitioner and the Board agent conducting the election. Pursuant to that Stipulation, the parties waived the issuance of a Regional Director's Report on Challenges, the filing of exceptions thereto, and a hearing on those particular ballots and agreed to open and count the 24 ballots challenged by Petitioner and to sustain the 11 challenges to the ballots made by the Board agent. Accordingly, on November 3, the ballots of Fred Arrollo, Earl Avara, Alejandro Barajas, Donna Castellon, Silvino Da Silva, Ricardo Paz De Rocha, Rafael Duenas, Jose Esparza, Ronald Howard, Joann Jenkins, Laverne Jones, James Kennedy, Elser Lam, Brian Penno, Gurpreet Sandhu, Rajwinder Sandhu, Rodolfo Sandoval, Vincent Serna, Joseph Surratt, Pedro Tagalicud Jr., Alvin Threet, Pedro Valles, Pa Vans, and Chris Young were opened and counted. Additionally, the ballots of Calvo Bacilisa, Elias Cruz, Piedad Esquivel, Gurbax Kaur, Kulwinder Kaur, Carmen Lopez, Maria de Jesus Ochoa, Juan C. Reyes, Angel Ruis, Maria Torres, and Deydalina Montufar were sustained and not counted. A Revised Tally of Ballots issued which showed the following:

Approximate number of eligible voters.....	1064
Number of void ballots .....	9
Number of votes cast for Petitioner.....	311
Number of votes against participating labor organizations...	286
Number of valid votes counted.....	597
Number of challenged ballots.....	41
Valid votes counted plus challenged ballots.....	638

The remaining challenged ballots were sufficient in number to affect the results of the election. Following the issuance of the Revised Tally of Ballots in the most recent election, the Employer filed timely objections to the election, a copy of which was served on Petitioner by the Region.

Pursuant to the Seventh Supplemental Decision, on December 30, 24 challenged ballots were opened and counted. A Second Revised Tally of Ballots issued which showed the following:

Approximate number of eligible voters.....	1064
Number of void ballots .....	9
Number of votes cast for Petitioner.....	333
Number of votes against participating labor organizations...	288
Number of valid votes counted.....	621
Number of challenged ballots.....	17
Valid votes counted plus challenged ballots.....	662

The remaining challenged ballots are not sufficient in number to affect the results of the election.

### **The Objections**

#### Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15

1. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees and/or members of their families were by threats of economic, physical, and other retaliation if they did not join, support, or select the Petitioner as their collective bargaining representative.
2. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by threatening loss of employment if they did not support the Petitioner in the election.
3. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by creating an atmosphere of fear and coercion.
6. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by informing employees that they would be discharged or otherwise disciplined if the Petitioner did not prevail in the election.

7. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by misrepresenting facts which were critical and material to the election and to which the Petitioner had exclusive knowledge.

9. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling or implying to employees that either the Petitioner or someone else would contact the Immigration and Naturalization Service (INS) concerning the legality of the employees' employment in the United States if the employees did not support the Petitioner in the election or if the Petitioner did not prevail in the election.

11. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling or implying to employees that appearing at the polls to vote would require an employee to present identification which the Board agents could use to determine whether or not the employee was legally in the United States.

15. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees and/or implying to them that seasonal employees would be made regular, full-time employees if the Petitioner prevailed in the election.

As the objecting party, the Employer has the sole burden of providing evidence in support of its objections. *City Wide Insulation of Madison, Inc.*, 338 NLRB 444 (2003). To satisfy this burden, the Employer may specifically identify witnesses who would provide direct rather than hearsay testimony to support its objections, specifying which witnesses would address which objections. *Id.*, *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). In the alternative, the Employer may provide specific affidavit testimony and other specific evidence in support of its objections. *City Wide Insulation of Madison, supra*. This evidence or description of evidence must be provided to the Regional Office "within 7 days of the day the objections are required to be filed or within such additional time as may have, upon a timely request, been allowed by the Regional Director." *Id.* (quoting

from NLRB Casehandling Manual (Part Two) Section 11392.6). Although the Employer submitted a timely statement supporting certain of its objections, it did not present any evidence, description of evidence, names of witnesses or affidavit testimony in support of Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15. Accordingly, Objections Nos. 1, 2, 3, 6, 7, 9, 11 and 15 are overruled.

Objection No. 16

16. By the above and other acts and conduct, the Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees.

As this is a “catch-all” objection and does not assert any independent objectionable conduct for which the Employer has presented any supporting evidence, it is overruled.

Objection No. 12

12. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees or implying to them that the Petitioner did not represent bargaining-unit employees from 1991-2004.

According to the Employer, Union officials told approximately ten employees that the Petitioner did not legally represent them during the period 1991 through the date of the election because no union dues were being taken out of their paychecks. Even assuming that Union agents made such statements, the Board has long held that it will not probe into the truth or falsity of the parties’ campaign statements. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Moreover, it is not readily apparent, and the Employer proffered no explanation, of why such statements would have any impact on employee free choice in the election.

Accordingly, Objection No. 12 is overruled.

Objection Nos. 4 and 14

4. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and

coerced employees by making promises to them concerning matters which the Petitioner was capable of following through on and/or by making promises to employees which caused the employees to believe falsely that they would automatically receive economic and other rewards if the petitioner prevailed in the election.

14. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by telling employees or implying to them that the Petitioner would provide them and/or their families with “Green Cards” or would otherwise insure that the employees would be made legal to work in the United States if the Petitioner prevailed in the election.

The Employer asserts that Petitioner and/or its agents told employees at various times prior to the election that Petitioner would guarantee “green cards” for employees, that other employees would be given automobiles and that certain employees would be granted wage increases.

These objections raise material issues of fact and law that can best be resolved by a hearing.

5. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by interrogating employees regarding their voting intentions and sympathies in the election.

According to the Employer, on one occasion an individual who identified himself as being with the Petitioner, approached an employee as she was leaving her home and asked how she was going to vote in the election. A second individual then startled the employee and both men stood in front of her, blocking access to her vehicle. On a second occasion, two individuals who identified themselves as being Petitioner’s representatives approached an employee as she was leaving work and asked how she was going to vote in the election. When the employee did not answer, one of the representatives grabbed the employee’s shoulder.

This objection raises material issues of fact and law that can best be resolved by a hearing.

8. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by possessing, maintaining, and/or checking off a list of eligible employees when the employees appeared at the Employer's facilities to vote.

10. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by entering the DFA Room at the Employer's facility where the voting was taking place during a time that voting was taking place.

18. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees when an agent of the Petitioner placed himself in a position where eligible employees had to pass him in order to enter the polling area both before and during the polling period.

The Employer asserts that Petitioner secretary/treasurer Lucio Reyes stood on the sidewalk outside the Employer's facility during both voting sessions so that off-duty and striking employees would have to pass by him as they arrived to vote. According to the Employer, Reyes spoke with each such employee, pulled a paper out of his briefcase, and then made a mark on the paper. The Employer contends that Reyes thereby engaged in electioneering that would be objectionable under *Milchem, Inc.*, 170 NLRB 362 (1968) and also maintained a list of employees who came to vote, which would constitute objectionable conduct under *Masonic Homes of California, Inc.*, 258 NLRB 41 (1981), *Piggly-Wiggly No. 011*, 168 NLRB 792 (1967) and *International Stamping Co.*, 97 NLRB 921 (1951).

During one of the sessions, Reyes left his outside location in order to cast a ballot in the election. Since Reyes was employed in the bargaining unit at the time of the first election, Petitioner contended that he was still eligible to vote in any rerun elections. According to the



Employer, there were other eligible voters waiting to vote during the time Reyes was in the polling area.

These objections raise material issues of fact and law that can best be resolved by a hearing.

13. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees when an election observer for the Petitioner campaigned with or otherwise spoke to voting employees in the DFA Room before the employees entered a voting booth while the election was taking place.

17. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by contacting, electioneering with, or otherwise speaking to employees during the polling period.

19. The Petitioner, its agents and/or others acting on its behalf and others interfered with the laboratory conditions of the election and/or intimidated, restrained, and coerced employees by electioneering with or otherwise speaking to employees who were waiting in line to vote.

According to the Employer, one of Petitioner's election observers engaged in electioneering by speaking in Punjabi with one of the Employer's election observers and with employees who were in the polling area waiting to vote.

These objections raise material issues of fact and law that can best be resolved by a hearing.

### **Notice of Hearing**

**IT IS HEREBY ORDERED** that a hearing on Objections Nos. 4, 5, 8, 10, 13, 14, 17, 18, and 19 be held before a duly designated Administrative Law Judge of the Board.

**IT IS FURTHER REQUESTED** that the Administrative Law Judge designated for the purpose of conducting the hearing prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to

the Board as to the disposition of said issues. Within fourteen (14) days from the issuance of said report, any party may file with the Board an original and one (1) copy of exceptions to such report, with supporting brief, if desired. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, on the other party to the proceeding and with the undersigned. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

**PLEASE TAKE NOTICE** that on February 10, 2005 , at 9:00 a.m., PST, and continuing on consecutive days thereafter, at the Oakland Regional Office, 1301 Clay Street, Suite 300N, Oakland, California, a hearing pursuant to Section 102.69 of the Board's Rules and Regulations will be conducted before an Administrative Law Judge of the National Labor Relations Board upon the aforesaid objections, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony and to examine and cross-examine witnesses with respect to said matters.

DATED AT Oakland, California, this 5th day of January, 2005.<sup>4</sup>

/s/ Alan B. Reichard  
Alan B. Reichard, Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5211

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<sup>4</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, a Request for Review of my Supplemental Decision may be filed with the National Labor Relations Board, 1099 14th Street, NW, Washington, DC, 20570-0001. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections and/or challenged ballots are not part of the record unless included in the Supplemental Decision or appended to the Request for Review or opposition thereto which a party submits to the Board. The Request for Review must be received by the Board in Washington, DC by January 19, 2005.